BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: OAKLAND UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2015060347

DECISION

The Oakland Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on June 8, 2015. Oakland named Parent on Behalf of Student as the respondent.

Presiding Administrative Law Judge Margaret M. Broussard, heard this matter in Oakland, California, on August 18, 2015. The hearing was completed, oral closing arguments made, and the case was submitted on August 18, 2015. Alejandra Leon, Attorney at Law, represented Oakland. Geri Baskind, director of legal support services for programs for exceptional children for Oakland, attended the hearing on behalf of Oakland.

Mother represented Student. Mother was accompanied throughout most of the hearing by Constance Oliver, a therapist for Student and his family.

ISSUE

ISSUE: Does the individualized education program dated March 9, 2015, offer Student a free appropriate public education in the least restrictive environment?

SUMMARY OF DECISION

Oakland did not establish that the IEP of March 9, 2015, offered Student a FAPE in the least restrictive environment. The IEP of March 9, 2015, was not a complete IEP document and, even when considered in conjunction with the other IEP's starting in

September 2014, Oakland failed to show that there was a clear, specific formal offer of placement.

Oakland also did not meet its burden to show that the March 9, 2015 IEP alone, or in combination with the September 29, 2014 or November 2014 IEP's, offered Student a FAPE because it failed to put on extrinsic evidence of the appropriateness of the IEP's. Instead, Oakland put on evidence asserting that Student needed a residential placement but failed to support its contention by proving that the IEP's which made that offer were appropriate. Finally, the March 9, 2015 IEP also did not provide Student a FAPE because there was no special education teacher present at the IEP team meeting.

FACTUAL FINDINGS

Jurisdiction

1. Student is a 14-year-old boy who currently resides with Mother within the geographical boundaries of Oakland. Student is eligible for special education under the categories of emotional disturbance and specific learning disability.

2013-2014 School Year

2. During the 2013-2014 school year, Student attended a day treatment program at Coynes Academy, a California certified non-public school run by Lincoln Child Center. While at Coynes, Student was in a special day class with behavioral and therapeutic support. Although Student's behaviors were variable from day to day, he often displayed extreme behaviors such as running away from school and into the road asking to be hit by vehicles, making irrational demands on staff, verbal aggression with peers, throwing rocks, and generally failing to follow rules. These behaviors continued through the 2014-2015 school year.

3. During the 2013-2014 school year, Student's behaviors were so concerning that, despite a low Student to staff ratio in the classroom, a one-to-one aide was added for Student three days a week in order to help keep him safe. Student was psychiatrically hospitalized at least three times during the school year directly from Coynes.

4. The IEP team met on June 12, 2014, and Oakland offered Student placement for the 2014-2015 school year in a day treatment program at Edgewood, a non-public school in San Francisco, via an amendment to Student's IEP, because Coynes Academy was scheduled to close in August 2014.

September 29, 2014 IEP Team Meeting

5. Student began the 2014-2015 school year at Edgewood in the day treatment program. An annual IEP team meeting was held on September 29, 2014. There was no specific testimony offered regarding this IEP at the hearing, with the exception of referencing the placement and services offer made to Student at Edgewood.

6. No IEP team meeting notice for this or any other IEP discussed below was offered or admitted. Mother attended the IEP team meeting, along with Student's special education teacher at Edgewood, Stephen Litman.

7. The present levels of academic achievement and functional performance pages were not addressed by any witness at the hearing. Witness testimony established Student's dangerous behaviors and peer difficulties but the testimony was never related to the appropriateness of any IEP. The IEP lists the results of the Woodcock-Johnson III, Test of Achievement on pages two and three of the IEP document, but has no indication when the assessment was given, who gave the assessment, or how the results of the assessment were used in the development of the IEP. There was no testimony at hearing regarding how to interpret the scores listed or how the scores informed the team regarding Student's present levels of academic performance. The IEP included information regarding Student's academic performance in reading, writing, and math, but no testimony or other evidence was proffered to show that these levels listed in the IEP were accurate. The IEP listed reading, writing, math, and behavioral/social/emotional as areas of need, but, again, this was not supported by any extrinsic evidence.

8. The IEP contained eight goals. There was one goal each in the areas of written expression, reading comprehension, and math calculation. There were five social/emotional goals in the areas of accepting consequences, not getting his way, handling frustration and anger, following directions, and expressing anger appropriately. There was no testimony as to the appropriateness of the goals, the measurability of the goals, or the least restrictive environment in which the goals can be implemented.

9. The IEP stated that Student needed a behavior intervention plan and a behavior plan dated September 29, 2014, was attached to the IEP. There was no testimony regarding how the behavior intervention plan was developed or that the behavior intervention plan as developed was appropriate for Student. Furthermore, there was no evidence as to whether the behavior plan would need to be modified if there was a placement change.

10. The September 29, 2014 IEP offered the following services and placement through September 28, 2015: specialized academic instruction in a non-public school for 317 minutes per day; behavior intervention services in a non-public school for 60 minutes a day; intensive individual services at the non-public school for 317 minutes a day; individual counseling 60 minutes a week; and parent counseling 60 minutes a week. There was no explanation in the IEP or in testimony of what intensive individual services were. There was

no extrinsic evidence presented as to the appropriateness of the services and the placement, with the exception of the placement location of day treatment.

11. The notes from the IEP indicated that

> Team discussed appropriateness of residential placement. [Student] has made a lot of improvements here, however, his behaviors are still very unsafe both at school and at home. Team agreed to closely monitor [Student's] incidents and behavior and meet again in a month to assess whether the placement is meeting his needs. Mom has expressed that she does not want him placed outside the home.

IEP Team Meeting October 27, 2014

12. The IEP team attempted to meet on October 27, 2014. The IEP amendment(s)/addendum page dated October 27, 2014, stated that the amendment/addendum had changes from the September 29, 2014 IEP. The document offered and admitted at hearing had notes from two separate meetings on October 27, 2014, and then November 12, 2014. For the October meeting, the document noted that Mother was not in attendance and that the meeting was rescheduled for November 12, 2014.

IEP Team Meeting November 12, 2014.

13. The limited evidence regarding this IEP is confusing and Oakland did not put on any witnesses to clarify the inconsistencies in the documents. Although there were notes dated November 12, 2014, on the document referenced in factual finding 12, the same document indicated that it was an amendment/addendum and that the changes made were to the September 29, 2014 IEP. However, offered and admitted at the hearing was an entirely separate IEP document dated November 12, 2014. The notes attached to that document, however, were the notes from the September 29, 2014 IEP team meeting and the signature page was completely blank. No testimony was elicited regarding any of these inconsistencies.

14. The amendment/addendum notes, which are not attached to the IEP document from November 12, 2014, do not appear to be complete notes of the IEP team meeting. The notes immediately started with Mother voicing her concerns about Student being far way in Utah and her concerns about placing Student residentially. The notes indicated that Student's behaviors were discussed and that concerns were raised about parental contact. Finally, the last paragraph mentioned about some kind of temporary placement, which appeared to be a residential placement at Edgewood. This document reads as if the offer from Oakland had been changed to residential placement.

15. The IEP document from November 12, 2014, is incomplete and inconsistent. The IEP indicated that it was an annual IEP. However, almost all of the pages, except the first page, are the exactly the same as the September 29, 2014 IEP, except that they each had

the November 12, 2014, date on each page. Despite the passage of almost three months since school started and more than six weeks since the previous IEP, there were no changes to Student's present levels of performance. There was no behavior intervention plan attached to the IEP, although the IEP indicated that one was attached. There were no signatures on the IEP or on the amendment/addendum page. The notes attached to the IEP were the notes from the September 29, 2014 IEP. As discussed earlier, the notes from the November 12, 2014 IEP were not attached to the IEP which bore that date. Finally, and most importantly, although the notes from the IEP indicated that Oakland was proposing a residential placement for Student, the placement offer on the IEP document remained day treatment at Edgewood.

December 17, 2014 IEP Team Meeting

16. Oakland's witnesses testified that Student needed a residential placement because of his escalating behaviors. Specifically, he needed a locked facility, he needed to not have access to the street when eloping, and he needed to be kept from dangerous implements because of his suicidality.

17. Mother visited the Edgewood residential facility, and at least one other residential facility proposed by Oakland, and did not believe that they were appropriate for Student. Mother cited three reasons, which were compelling. Student often eloped from Edgewood and ran in the street, and the residential placement at Edgewood would have Student in the same day program, simply adding a residential component. Oakland never explained how a residential placement at Edgewood would result in a safer environment for Student when he would be enrolled in the same program during the day, which afforded him access to the street. The other residential facility Mother visited was also located with ready access to the street.

18. Mother established that, contrary to the testimony of Oakland's Case Manager May Chaltiel, neither Edgewood nor the other facility she toured were locked facilities. Finally, Mother observed sharp knives accessible to students during at least one of her visits. Considering that Ms. Chaltiel was responsible for locating appropriate facilities for Student, her testimony that the facilities which she proposed for Student were locked was very concerning.

19. Edgewood was clearly concerned about Student's behaviors and the testimony made clear that both Oakland and Edgewood wanted Student's placement changed to a residential placement. On December 9, 2014, Edgewood issued a 20-day notice to terminate Student's attendance in their day treatment program.

20. Another IEP team meeting was held on December 17, 2014. This meeting was documented on an IEP amendment/addendum page, which stated that the meeting notes made changes to the November 12, 2014 IEP. Student's escalating, suicidal behaviors were documented and the placement offer was changed to a residential placement at Edgewood.

No changes were made to Student's present levels of performance, goals, or services to support a change of placement.

21. Oakland's witnesses described residential placement as having more services available for Student than at a day treatment placement. They noted specifically psychiatric services, 24-hour supervision, more individual and group therapy, and more behavioral services. At no time were any of these services written into any of Student's IEP's where a residential placement was offered. More disturbingly, Student's Case Manager from Oakland stated her policy is to place students in residential placements without making changes to their previous IEP and then make the changes to the IEP services to reflect the program in the residential placement on the IEP after the student is placed.

22. Student left Edgewood before winter break in December 2014. Mother suggested two non-public schools for Student and Oakland sent referrals for Student to these and at least three other residential placements. Neither non-public school accepted Student. One of the residential placements had an opening for Student and would accept him and Mother went to visit. As discussed above, Mother observed that the placement was not locked and that Student would have access to sharp objects. Mother did not agree to place Student residentially.

February 11, 2015 IEP Team Meeting

23. Yet another IEP team meeting was held on February 11, 2015. There was no special education teacher at this meeting and no evidence that the teacher was excused from the meeting. The meeting was documented on an amendment/addendum form which referenced the November 12, 2014 IEP as the IEP being changed. The notes indicated that a residential placement remained the offer of FAPE and discussed the higher amount of services available in residential, which, again, were not detailed in any IEP offer to Student. Mother signed releases for 4 more residential referrals.

24. However, this IEP amendment/addendum had an offer of FAPE services page attached to it. The IEP called for Oakland to provide home instruction for Student for 300 minutes a week until April 24, 2015, while referrals were being made to residential placements. There were no behavioral, therapeutic, or any other services offered in conjunction with the home instruction. It is unclear if the related services from one of the prior IEP's would continue. There is also no indication that Student had a note from a qualified professional placing him on home instruction. No testimony was elicited regarding the appropriateness of the home instruction for Student or the absence of any related services.

March 9, 2015 IEP Team Meeting

25. This IEP team meeting was documented on one amendment/addendum IEP page. There were no present levels of performance, goals, accommodations, or modifications listed. There was no special education teacher at the IEP team meeting. The

document consisted of the statements "Parent has toured Victor Treatment Center. School District offers residential placement. Parent is not in agreement." The last sentence read "Temporary Home Hospital service dates are adjusted to add one more week to give the parent time to make a decision." The document purports to change the November 12, 2014 IEP.

Witness Testimony

26. Oakland called only four witnesses to testify. None of the witnesses discussed Student's academics, with the exception of his teacher, who noted that Student was below grade level in academics, with no specifics. All of the witness testimony was centered upon Student's behaviors, the inappropriateness of day treatment, and the appropriateness of residential placement. None of the specific elements of the IEP's at issue were addressed or supported, with the exception of Student's need for residential placement. While there was evidence of Student's substantial behaviors, there was no testimony to support the appropriateness of the goals, services and placements offered to address these behaviors, and no specific testimony regarding academics at all. There was no testimony regarding the appropriateness or implementation the behavior plan that was attached to the September 29, 2014 IEP.

27. Lee Collyer, program manager from Coynes Academy, worked with Student from November 2012 through the end of the 2013-2014 school year as both a clinician and program manager. He testified regarding Student's emotional needs during the time he worked with Student and Student's IEP services while at Coynes Academy. His testimony regarding Student's behavior was credible. He testified clearly, without hesitation, and used specific examples to support his testimony. However, his testimony was of limited relevance since he was never asked to testify regarding the appropriateness of the any IEP for Student and his experience with Student was limited to the time before any of the IEP's developed which led to the March 9, 2015 IEP.

28. May Chatiel, Student's case manager, generally testified about the IEP team meetings, Student's behaviors, as reported to her, her opinion that Student needed a residential placement, and her efforts to secure a residential placement. Her testimony is given little weight. She has little experience with residential placements, and her educational background is in the arts, not mental health or education. She has a total of four years' experience in education, all with Oakland, and has changed jobs each of the four years. Her testimony about access to sharp instruments and locked facilities were shown to be false. She also failed to testify regarding the specifics of the IEP's which were admitted into evidence, and did not discuss the appropriateness of the goals, or services. Although she attended most of Student's IEP's which are discussed herein, she did not clear up any of the ambiguities regarding the placement offers and services noted above.

29. Robert Urowski, the Principal and Educational Director at Edgewood, testified about Student's behaviors at Edgewood, Edgewood's day treatment program, and Edgewood's residential program. His testimony about Student's behaviors and the day

treatment program are given substantial weight. He testified freely, gave clear and complete answers, and had personal knowledge about the program. However, he did not have personal experience with the residential program at Edgewood and, therefore, in this area, is given less weight. Furthermore, he was not questioned regarding the appropriateness of the elements of any of the IEP's for Student, which were developed while Student was at Edgewood. Therefore, his testimony was of little relevance, except as to Student's behaviors and his need for a residential placement.

30. Steven Litman, Student's teacher at Edgewood, also testified for Oakland. He generally testified about Student's behavior, task completion, and attendance at IEP team meetings. His testimony was limited and credible and he seemed to really care about Student. His testimony is given considerable weight. However, as with the other witnesses Oakland called, he was not asked to testify regarding the appropriateness of any of the IEP's he attended.

31. Mother testified and called one witness. Mother testified credibly and her testimony was heartfelt. Most of her testimony was about her intense desire to not have Student residentially placed and that his behaviors could be managed in a less restrictive environment. Her testimony is given substantial weight regarding her visits to the proposed residential placements. Mother also called Constance Oliver, Student's outside therapist, to testify. She testified from her personal experience with Student and was open and credible. However, her opinion that Student should not be residentially placed is not given much weight, as she is not familiar with the educational requirements for placement and had not observed Student at school.

Documentary Evidence

32. Oakland presented some historical IEP's and also the IEP's discussed above, from September 2014 through March 2015. The IEP's from September 2014 through March 2015 were intertwined and built upon one another, incomplete and sometimes contradictory. Oakland did not provide any testimony to support any of the elements of the IEP's, with the exception of whether Student's placement should be in a day treatment non-public school or a residential placement. Instead of showing that the IEP's it developed met Student's behavior needs and justified the placement determination of residential placement, Oakland only put on evidence of Student's behaviors and testimony supporting residential placement; it did not tie the behaviors to the IEP or show how the rest of the IEP supported the placement offer of residential placement.

33. A large amount of behavioral incident reports were admitted into evidence. However, no witness tied the incident reports to specific elements (i.e. present levels of performance, goals, or need for services) of any of the IEP's or the behavior plan, except as support for moving Student from a day treatment program to a residential program. There were also releases of information to various placements, signed by Mother, and the 20-day notice from Edgewood.

34. Included in the documentary evidence, which was admitted, was a large exhibit, which began with a copy of the referral from Oakland to Edgewood dated April 22, 2104. The first page of the exhibit was a fax cover page, which generally described the packet as including Student's most current IEP, psychological report, and a student data information sheet. Behind the fax cover page was a psychological evaluation completed by Oakland school psychologist Catherine Hatcher, dated March 30, 2009, an IEP dated April 22, 2014, (which included a positive behavioral intervention plan), and a functional behavioral assessment dated January 21, 2014. There was no student data information sheet included in the documentary evidence. There was no testimony from any witness regarding the appropriateness of any of these documents or how these documents formed a basis for the IEP's which were later developed.

35. The same exhibit then included a series of emails from Oakland to several day treatment and residential placements in February 2015. Behind these emails there was a copy of the IEP dated November 12, 2014. Finally, there was a psychological evaluation dated July 29, 2014, performed by Oakland school psychologist May Wong. This assessment was identified as a triennial assessment. There was no testimony, expert or otherwise, regarding the assessment.

36. There was no testimony regarding the interpretation of any of the assessment results included in this exhibit. There was no testimony regarding the implications of the assessments for Student and the extent to which the IEP teams relied upon the assessments in the development of any IEP.

37. The only reference in testimony to this entire exhibit was to the content of the emails sent to placements in February 2015, regarding whether Student had been accepted at the various placements. At no time during the hearing did any witness refer to the assessments, discuss the results of the assessments, or relate any of the assessment results to the development of any subsequent IEP. Consequently, the assessments are given no weight.

LEGAL CONCLUSIONS

Introduction – Legal Framework [1]

1. This due process hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006);[2] Ed. Code, § 56000, et seq.; and Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: 1) to ensure

[1] Unless otherwise indicated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

[2] All subsequent references to the Code of Federal Regulations are to the 2006 version.

that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living; and 2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that, despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 951 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit", or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. §§ 1414(b)(6)(A), 1415(f) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; Cal. Code Regs., tit. 5, § 3082.)

Issue One –Did the March 9, 2015 IEP offer Student a FAPE in the least restrictive environment?

5. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed,

reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) An IEP is a written statement that includes a statement of the present performance of the student, a statement of measurable annual goals designed to meet the student's needs that result from the disability, a description of the manner in which progress of the student towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(i),(ii); 34 C.F.R. § 300.320(a)(2), (3); Ed. Code, § 56345, subds. (a)(2), (3).) The IEP shall also include a statement of the program modifications or supports for school personnel that will be provided to the student to allow the student to advance appropriately toward attaining the annual goals, to be involved and make progress in the general education curriculum, and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii); Ed. Code, § 56345, subds. (a)(4)(A), (B).)

6. The IEP is the "modus operandi" of the IDEA; it is "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs. (*School Comm. of Town of Burlington, Mass. v. Department of Educ.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1996].)

CLARITY OF PLACEMENT OFFER

7. In *Union School Dist. v. Smith* ((1994) 15 F.3d 1519, cert. den., 513 U.S. 965 (*Union*)), the Ninth Circuit held that a district is required by the IDEA to make a clear, written IEP offer that parents can understand. The Court emphasized the need for rigorous compliance with this requirement:

> We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school District will greatly assist parents in "present[ing] complaints with respect to any matter relating to the ... educational placement of the child." 20 U.S.C. § 1415(b)(1)(E).

(*Union , supra*, 15 F.3d at p. 1526; see also *J.W. v. Fresno Unified School Dist.* (E.D. Cal. 2009) 626 F.3d 431, 459-461; *Redding Elementary School Dist. v. Goyne* (E.D.Cal., March 6, 2001 (No. Civ. S001174)) 2001 WL 34098658, pp. 4-5.)

8 One District Court described the requirement of a clear offer succinctly: *Union* requires "a clear, coherent offer which [parent] reasonably could evaluate and decide

whether to accept or appeal." (*Glendale Unified School Dist. v. Almasi, supra,* 122 F.Supp.2d at p. 1108.)

9. *Union* involved a district's failure to produce any formal written offer. However, numerous judicial decisions invalidate IEP's that, though offered, were insufficiently clear and specific to permit parents to make an intelligent decision whether to agree, disagree, or seek relief through a due process hearing. (See, e.g., *A.K. v. Alexandria City School Bd.* (4th Cir. 2007) 484 F.3d 672, 681; *Knable v. Bexley City School Dist.* (6th Cir. 2001) 238 F.3d 755, 769; *Bend LaPine School Dist. v. K.H*. (D.Ore., June 2, 2005, No. 04-1468) 2005 WL 1587241, p. 10; *Glendale Unified School Dist. v. Almasi* (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1108**;** *Mill Valley Elem. School Dist. v. Eastin* (N.D.Cal., Oct. 1, 1999, No. 98-03812) 32 IDELR 140, 32 LRP 6047; see also *Marcus I. v. Department of Educ*. (D. Hawai'i, May 9, 2011, No. 10–00381) 2011 WL 1833207, pp. 1, 7-8.)

10. Oakland has asked for a determination that the March 9, 2015 IEP offers Student a FAPE and asks that it be allowed to implement the IEP over parental objection. However, Oakland failed to meet its burden to show that it made a clear, specific, formal written offer, which Parent could accept or reject.

11. The March 9, 2015 IEP is devoid of almost every element required in an IEP. If the March 9, 2015 IEP was intended to change only the ultimate placement offer of the previous IEP's, there was no testimony to support this contention. Even assuming that this was the intent, the previous IEP's are devoid of the specificity required to determine what the offer to Student ultimately was. At no time on any of the IEP's where a residential placement was offered, were the specific services for a residential placement delineated. Oakland's case manager actually testified that the specific services are not documented until after the Student is placed and not on the IEP which offers the residential placement. This is a clear violation of the *Union* requirement. A parent cannot determine whether to accept or reject a placement without the specific components of the placement identified in the IEP.

12. The September 29, 2014 IEP was developed to support a day treatment placement. The evidence established that a residential placement offers services in excess of a day treatment placement and that Student needed additional services, although no evidence was presented and no findings are made as to what those additional services should be. The November 2014 IEP notes indicate that a residential placement was offered, while the services page of the IEP still makes an offer for a day treatment program. This failure to make a clear placement offer also fails to meet the *Union* standard.

13. The December 17, 2014, February 11, 2015, and March 9, 2015 IEP's also fail to make any specific offer for Student's residential placement. With the exception of changing the wording of the placement offer from day treatment to residential, no changes were made to specific minutes of services, the frequency and duration of Student's related services, or any other change which would support changing Student's placement from day treatment to the most restrictive placement, residential.

14. It is also unclear the interplay between all of the IEP's. The March 2015, February 2015, and December 2014 IEP all indicate that they are changes to the November 12, 2014 IEP. However, the November 2014 IEP is missing signatures, the note page is not attached, and it is missing the behavioral intervention plan, which the IEP says is required. The note page from November 2014 indicates that it changes the September 29, 2014 IEP. The result is a confusing set of documents that is impossible for this ALJ to decipher after a hearing, let alone a parent when being presented with these IEP's.

15. The March 9, 2015 IEP, even if it incorporates all of the previous IEP's back to September 29, 2014, does not have a clear, specific, formal offer of placement and, as such, does not offer Student a FAPE.

BURDEN OF PROOF

16. At the hearing, the party filing the complaint, in this case Oakland, has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; See 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA due process hearings is preponderance of the evidence].)

17. Even if it was possible to determine the specifics of the offer made to Student in the March 9, 2015 IEP, Oakland failed to meet its burden to show that any of the IEP's from September 29, 2014, through March 9, 2015, offered Student a FAPE. In this case, Oakland had the burden to show that the IEP's developed offered FAPE in the least restrictive environment. Oakland, however, simply put the IEP's in evidence and put on evidence regarding Student's behavior and their position that Student needed a residential placement.

18. With the exception of behavior and peer interactions, Oakland failed to put on any extrinsic evidence to show what Student's needs were. Even for Student's behavior and peer interaction needs, Oakland did not present evidence to show that any IEP met Student's needs in these areas. With the exception of the ultimate question of Student's placement, Oakland did not put on evidence that the contents of the IEP were legally compliant, accurate, and were reasonably calculated to provide Student with FAPE.

19. The IEP's themselves do not prove that the IEP's are reasonably calculated to provide FAPE. Oakland failed to produce extrinsic evidence to prove the appropriateness of the IEP's and did not proffer such evidence at the hearing. Oakland did not put on the evidence necessary to allow them to meet their burden that any IEP provided Student FAPE.

REQUIRED MEMBERS OF AN IEP TEAM

20. The IDEA requires a district to ensure that an IEP team for a child with a disability include not less than one general education teacher of the child (if the child is, or may be, participating in the general education environment) and not less than one special education teacher of the child. (34 CFR § 300.321 (a).)

21. The failure to include at least one general education teacher on a child's IEP team may result in a deficient IEP. (*See, e.g., M.L. v. Federal Way Sch. Dist.*, 42 IDELR 57 (9th Cir. 2004), because the student might have been placed in an inclusion classroom, the district erred in holding an IEP meeting without a general education teacher.)

22. Under the IDEA, in matters alleging a procedural violation, an ALJ may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE; significantly impeded parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to parents' child; or caused a deprivation of educational benefits. (20 U.S.C. 1415(f)(3)(E)(ii).)

23. The March 9, 2015 IEP team meeting did not have a special education teacher in attendance. Oakland provided no explanation for the absence of any special education teacher of the Student. A residential placement is the most restrictive placement and, as part of the placement, a Student is removed temporarily from his home. Any residential placement offer requires a careful analysis of whether Student can derive educational benefit in any less restrictive environment as well as several other factors. The attendance of a special education teacher is critical to these determinations.

24. By all accounts, Student was exclusively enrolled in special education classes while at Coynes and Edgewood and there was no discussion that Student would be enrolled in any regular education classes. Therefore, it may not have been an procedural error to fail to have a general education teacher at the IEP team meetings. However, especially given the lack of a general education teacher, a special education teacher should have been at all of Student's IEP team meetings and the failure to have one is a procedural violation. Without the benefit of a special education teacher, or any teacher, at the March 9, 2015 IEP team meeting, there was no input from a teacher regarding Student's placement and services. This lack of information denied Mother her right to meaningfully participate in the development of the IEP, which is another reason that the March 9, 2015 IEP did not provide Student a FAPE

ORDER

1. Oakland may not implement the March 9, 2015 IEP over parental objection.

2. All other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Parent on Behalf of Student, prevailed on the only issue.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: September 16, 2015

/s/

MARGARET BROUSSARD
Presiding Administrative Law Judge
Office of Administrative Hearings